APPENDIX A

REPORTS AND PROPOSALS

SENTENCING COMMISSION'S SYMPOSIUM ON DRUGS AND VIOLENCE PUTS EMPHASIS ON PREVENTION*

[53 CrL 1265]

Many speakers call for elimination of federal mandatory minimum sentences.

Although the U.S. Sentencing Commission's work is regularly denounced as "draconian" by members of the criminal defense bar and a vocal minority of the federal judiciary, Commission Chairman William W. Wilkins and others speaking at a three-day symposium last week on "Drugs and Violence in America" put forward a markedly different view of what's right and wrong with federal sentencing. Federal mandatory minimum sentences for drug crimes were criticized by many speakers, on the grounds that they "skew" the federal Sentencing Guidelines' multi-factored approach to sentencing, do not have the deterrent effect on crime Congress evidently intended, and are causing prison officials to prematurely release violent criminals to maintain a supply of beds for drug offenders. Broadly speaking, the consensus of the invited speakers was that the federal government's drug control effort should move away from punishment and interdiction, and toward prevention. Increased spending on jobs programs, Head Start, and drug treatment were urged; the argument for decriminalization of drugs was also presented.

The symposium, sponsored by the Sentencing Commission, brought together officials from all parts of the federal criminal justice establishment—judges, prosecutors, defense counsel, law enforcement, probations officers, prison administrators, educators and the research community. It was held in Washington, D.C., June 16-18.

During the opening session, Wilkins told the gathering that the commission has identified "crime control" as its main objective. To reach this goal, the choice before the nation is not between either a "hard" or a "soft" approach. Rather, Wilkins said, the country must

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* Actual page numbers are referenced by [n].

focus on the causes of crime, and solve those problems in a humane fashion. Wilkins spoke of the need for new attitudes about guns and for a re-examination of the federal government's approach to crime.

FEDERAL-STATE PARTNERSHIP

Attorney General Janet Reno, delivering the symposium's keynote address, said the first order of business is to reduce the political rhetoric surrounding drug and crime issues and create a partnership between state and federal officials. By working together, "we can make a difference with respect to crime, drugs and violence in America," she said.

The federal government needs to move away from the past practice of dictating solutions to the state and local governments but not providing the resources needed to implement them, Reno said. She exhorted state and federal prosecutors' organizations to get together and adopt a "rational policy as to what should be charged in federal and state court."

Rather than making charging decisions on the basis of the amount of prison time a conviction in federal court could bring, prosecutors should look instead to availability of prison resources. "The American people are fed up with the get-tough sentences if there are not enough prisons beds to implement them," she said. She called on federal prosecutors and politicians to be frank with the people. In many places criminals do not serve their entire sentence, or even a large part of it, she noted.

Drawing on her personal experience in Florida's criminal justice system, Reno said that defendants in that state serve only 20-30 percent of the sentence imposed. Dangerous prisoners are being let out "sooner rather than later," because of federal ceilings, she said. And, whatever amount of time is served, inmates are simply returned to the street. "It makes no sense to put drug defendants back onto the street—there's no backstop, or fallback, for them. They go back to their old habits," she said. "It's a stupid expenditure of taxpayer dollars."

Reno called for a transitional program "so offenders can get off on the right foot." Any such program should include alternative

housing sites so drug offenders don't [53 CrL 1266] go back into the environment that created the problem. Also needed is job training and placement, she said.

The country also needs to look at family and domestic violence, Reno continued. She recounted a study conducted in Dade County, Fla., which indicated that 40 percent of the county's homicides came about as the result of domestic violence. This tragedy spills over into the next generation. "Children who see violence in the home come to accept violence."

Where will the money come from? Reno told the gathering (of mostly federal officials) that there will not be a lot of money to spend on new federal initiatives. Thus, government's task will be to evaluate how funding is currently spent and focus resources on programs that are working. Presently, there are 37 agencies dealing with drug enforcement, she noted. Savings could be realized by addressing this inefficiency.

FOCUS ON CHILDREN

The focus of the federal government's effort must be on juveniles, Reno said. "It's too late to wait until they are 12-13 years old. By that time they've already fallen behind in school, they can't read up to grade level, their academic performance is poor, so they're acting out to get attention in other ways." Reno declared that the "root cause" of the country's social ills is that "for the last 30 years we've forgotten and neglected our children."

"I'll never be able to build enough prisons unless the children are reached," she said. This was the message that Reno exhorted the symposium attendees to send their friends, neighbors, and elected representatives. Unless business leaders step forward, "crime will be so bad they won't be able to do business." Unless the needs of the country's juveniles are addressed, "pensions won't be worth the paper they're written on."

The solution must be built around "balanced punishment and prevention," Reno said. "No one has ever successfully raised a child on punishment alone." On the subject of prevention, she cited a

statistic: for every $1 spent on prenatal care, $3 is saved during the next 3-4 years of the child's life.

"We need to make early investments in children," Reno continued. How? Her solution was an initiative she called "A National Agenda For Children." The agenda would be implemented by a partnership between federal and state governments. Communities will identify the problem; then state and federal government will step in to fund and implement the solutions proposed by the communities. Reno identified four principal components that she said were vital to the success of the initiative:

- *Teenage pregnancies.* Something must be done about teen pregnancies, Reno said. In addition to working with young women, government efforts must also be directed to young fathers. New programs must be developed for high school students.
- *Start with the very young.* Government efforts need to be focused on children from birth to age three. Fifty percent of all learned human responses are learned during the first year, Reno said. The concept of punishment and reward is learned during the first three years. Unless this elemental human response is developed in children, no amount of later punishment for crime will be effective.
- *Conflict resolution programs.* Beginning in the elementary schools, children need to un-learn violence as a means of settling disputes.
- *Curb television violence.* Television advertisers need to be told not to feature violence in commercials aired at times when young children are watching. Reno complained that the federal government is not doing enough for children after school hours, when many simply watch television or roam the streets. She suggested that money now spent on prisons be used for family-oriented programs, or to occupy children during after-school hours. "We need to focus on "rebuilding the family around the child," she said.
- *Early aptitude and interest testing.* Students should be tested in seventh grade, then steered into summer jobs that provide

valuable, necessary skills—not make-work. The government should create opportunities for public service jobs for youth.

In closing, Reno recalled the image of the Peace Corps. "Our challenge is on the streets of America today," she said. "If we give our children half a fighting chance to make it, they will."

A DEMAND-SIDE STRATEGY

Among the more provocative panel discussions to be heard during the symposium was "Approaches to the Problems of Drugs and Violence," which featured Baltimore Mayor Kurt L. Schmoke's well-publicized call for decriminalization of drugs and comments from Mathea Falco, author of "The Making of a Drug-Free America."

The federal government's pursuit of a supply-side strategy to the drug problem has been a failure, Falco said. This failure provides an opportunity to consider a demand-side strategy—one that focuses on education and treatment. "People can learn not to use drugs," Falco said. As an example, she cited the country's experience with a formerly popular addictive substance, tobacco. Despite the fact that tobacco is legal and highly advertised, tobacco use has steadily decreased. And, among people who are concerned about their health, marijuana and cocaine use are also on the decline, Falco said.

"Sustained, rigorous" drug treatment works, she said. Falco claimed that three out of four individuals can quit taking drugs if they have treatment. Returning again to tobacco, Falco said that the average successful quitter of cigarette smoking relapsed four times before quitting for good. Society, and the criminal justice system, unwisely holds addicts of other drugs to a much higher standard, she said. Because many drug addicts eventually come under the control of the criminal justice system, there exists a tremendous opportunity to help these individuals. There are many effective treatment programs in existence, yet the federal government is doing "virtually nothing," she said. Falco exhorted the federal government to stop measuring success in the so-called drug war by the number of arrests and drug seizures, and to start measuring success by the number of addicts treated and cured.

Like Falco, Schmoke took as his starting point the asserted failure of the standard approach—police, prosecution, and jail—to the drug problem. What is needed, he said, is a new approach based on "realism, public health and national service." Schmoke agreed with **[53 Crl 1267]** Reno that federal mandatory minimum sentences should be eliminated. Second, the government's current emphasis on punishment as opposed to treatment should be reversed. Schmoke recommended that 70 percent of available resources should be spent on treatment, and the remaining 30 percent on law enforcement. "We are being good soldiers in the war on drugs, but we are not winning," he maintained.

"Decriminalization" means fighting the war on drugs with a public health strategy, Schmoke explained. Law enforcement remains important, but drug addiction is "a problem for doctors to treat, not for police to prosecute." Under a decriminalization strategy, the government would control the distribution of now-banned drugs just as it does with any other prescription drug. By adopting this approach, the government would take the profit out of street-level drug dealing, which is the main source of drug-related violence. The police could then focus on the major drug dealers. The current manner in which the "drug war" is being conducted is demoralizing and is making criminals of African-Americans, Schmoke said. He reminded the audience of the nation's experience with alcohol prohibition and suggested that experience counsels in favor of drug decriminalization. "The current approach is a national disaster, and it will not bring peace to our streets," Schmoke said.

Responding to Schmoke's remarks, Reuben M. Greenberg, Chief of Police in Charleston, S.C., raised a number of points that he said have not been adequately considered by drug decriminalization advocates. Greenberg mentioned a study indicating that legalization will bring about a 20-30 percent increase in drug use. The problem of "cocaine babies" will remain, as will the problem of keeping powerful drugs out of the hands of teenagers and younger children. Also, Greenberg stated, decriminalization advocates have not articulated what should be done when it is finally time to tell the drug user to stop. Finally, proponents of drug decriminalization assume that drug addiction is the main cause of crime and violence. In many cases, he said, drug addicts are "criminals first, drug users second."

Joseph D. McNamara, a research fellow with the Hoover Institution and former chief of police in San Jose, Calif., spoke of the need for the government to move away from its current hard-line approach to drug and crime control. Drug arrests are futile, he said. Neither will gun control work "in the absence of a change in the value system of young people."

The "drug war" has become a "race war," McNamara asserted. African Americans are arrested at 4-5 times the rate of whites, yet some studies show that whites account for 80 percent of all illegal drug use. The current criminal approach, typified by "in the face confrontations," has evolved into a major assault on the African American community, McNamara said. Indeed, the police, as combatants in the "war on drugs" are starting to treat people as the enemy, he charged.

McNamara called for an end to the hostilities and offered a number of steps he said would be more productive. First, funding now directed to building prisons should be made available for neighborhood groups and youth programs. Second, the government's anti-drug efforts should emphasize treatment and prevention. Police, he said, "should be partners in the community, and not drug war soldiers." Neighborhoods should have the right to declare themselves "drug-free zones." Finally, non-violent conflict resolution methods should be taught in the elementary schools.

NO GRAVER PROBLEM

The symposium's final session was highlighted by a luncheon address delivered by Chief Justice William H. Rehnquist.

During remarks introducing Rehnquist, Wilkins availed himself of the opportunity to speak one more time on the subject of mandatory minimum sentences. The mandatory minimum approach to sentencing is neither the fairest nor the most efficient means of operating a sentencing scheme that has crime control as its objective, he said. An ideal sentencing scheme would be tough "some of the time" and fair "all of the time," Wilkins said. It would eliminate disparity among similarly situated individuals convicted of similar crimes, and it would impose a sentence proportionate to the offense. Finally, an ideal sentencing scheme would have a high degree of

certainty. A mandatory minimum sentencing scheme achieves only one of these five objectives—it is tough—and neglects the others, Wilkins charged.

Rehnquist's remarks would later echo Wilkins' criticism of Congress' current approach to federal drug sentencing, but he began by declaring that the judiciary has a "limited perspective" on the issue and that the course of the nation's so-called war on drugs "ultimately raises policy questions that are best solved by popular opinion." Judges have no unique perspective, he said. Nevertheless, Rehnquist offered his personal view that there is "no graver national problem" than the plague of drugs and violence. Matters of the budget deficit and the balance of trade do not have the same sense of urgency, he said.

Rehnquist recounted recent history, during which more federal drug crimes have been created and more torial authority has been blurred, with formerly state "street crimes" now ending up in federal court. "One consequence of these efforts has been the near transformation of some federal courts into what might be called national narcotics courts," Rehnquist said. Briefly, the Chief Justice recounted the toll that federalization of crime, especially drug crime, has taken on the federal judicial system. During the years from 1980-90, the number of criminal cases has risen 60 percent. Drug prosecutions rose 200 percent. Drug cases are more time-consuming than other judicial business. While 25 percent of the federal caseload is drug crime, these cases occupy 48 percent of a federal judge's total time.

The 1984 Sentencing Reform Act, which underlies the Sentencing Guidelines, has had a profound effect on the federal courts, Rehnquist continued. Sentencing appeals which were non-existent before the act, now are commonplace. Sentencing hearings, which were once brief affairs, now can take an hour or more to conduct. Sentencing reports are necessarily more complex. Probationary sentences have decreased, but sentences with a "supervised release" component have doubled in the last three years. Panel defense attorneys with appointments under the Criminal Justice Act find that they now need to devote a great deal of time to the federal Sentencing Guidelines. **[53 Crl 1268]**

Speaking as the representative of the federal judiciary, Rehnquist turned to the subject of judicial reaction to current federal

drug sentencing and the federalization of other crimes. While a small number of judges may long for the halcyon days of unfettered discretion, "a respectable body of opinion" focuses its criticism on federal mandatory minimum sentences and not on the sentencing guidelines, he said. "There is almost no likelihood that congress will go back to the days of pre-guidelines sentencing," Rehnquist said. "The guidelines will be with us for the foreseeable future." Rehnquist complained that mandatory minimum sentencing statutes are often the result of last-minute floor amendments, tacked on to other measures by politicians who want to appear tough on crime.

A majority of the federal judges oppose the current approach to drug sentencing, which is based principally on their objections to federal mandatory minimum sentencing statutes, Rehnquist said. These judges view mandatory minimums to be unduly harsh on the drug "mules" who merely ferry drugs from one location to another. Second, mandatory minimums vest too much discretion in prosecutors. Third, they skew the sentencing guidelines by requiring a minimum prison term without regard to any other relevant sentencing factor. Fourth, mandatory minimums have caused federal prison populations to balloon in recent years.

The call for more federal crimes has become "a veritable siren song" for Congress, Rehnquist charged. In this regard, Rehnquist suggested that Congress had perhaps overestimated the need for new federal crimes, and he expressed the hope that a principled basis could be found for a jurisprudence for determining what should and should not be a federal crime. The Chief Justice noted that Attorney General Reno has pledged to re-examine the Department of Justice's approach to determining which crimes should be prosecuted in federal court. He also cited recent statements made by some influential members of Congress which indicated a similar desire to re-examine the issue of federal mandatory minimum sentences. If changes are to be made, Rehnquist said, the federal judiciary should be consulted by Congress beforehand.

Nevertheless, "alternatives cannot and should not be committed to judges, lawyers, and experts," Rehnquist declared. "The ultimate questions should be decided by the representatives of the people."

APPENDIX B

THE ILLINOIS SUPREME COURT SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE

FINAL REPORT*
Part II

December 1993

Jerold S. Solovy, Chairman

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* Only Chapter VI of this report is copied herein.

VI. AUTOMATIC AND DISCRETIONARY TRANSFER, AND APPEALABILITY OF DISCRETIONARY TRANSFER ORDERS [60]*

Introduction

Spiraling crime, resultant public fear, and diminishing government and private treatment resources have led to the virtual abandonment of rehabilitation as a goal of our adult criminal system. Increased involvement of juveniles in violent crime has recently received a blitz of national and local media coverage. This increased scrutiny is often coupled with public outrage over a juvenile court system which is perceived as failing to hold juveniles accountable for their actions. As a result, the rehabilitative model — the very foundation of the juvenile court system — is crumbling.

Dissatisfaction with the juvenile court system traditionally has been met by legislators, members of the law enforcement community and the public with increased efforts to transfer juveniles from juvenile court into the adult criminal system. In Illinois, each new legislative session generates new bills designed to expand the number of offenses for which a juvenile may be automatically tried as an adult.[89]

Most recently, the United States Congress has entered the fray. Illinois Senator Carol Moseley-Braun recently introduced an amendment to the Senate's comprehensive crime bill. Her amendment would authorize United States attorneys to prosecute, as adults, juveniles age 13 or older who are charged with murder, attempted murder, armed robbery with a gun, aggravated battery or aggravated

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* Actual page numbers are referenced by [n]

89 Two such bills are currently being debated in the Illinois General Assembly's House Subcommittee on Juvenile Justice. House Bill 54 seeks to amend the Juvenile Court Act to provide for transfer to adult criminal prosecution of a minor at least 15 years of age who commits certain weapons violations on school grounds. House Bill 123 seeks to add the crime of aggravated battery with a firearm or aggravated discharge of a firearm to the list of offenses for which a minor may be automatically transferred.

assault with a gun, [61] and drive-by shootings.[90] The amendment passed the Senate by a sixty-four to twenty-three vote margin.

Clearly, transfer laws have been, and remain today, a popular and expedient approach to the problem of juvenile crime. It is not clear, however, that transfer has been an effective response to juvenile crime. Increased use of transfer, for instance, does not appear to have resulted in a reduction of juvenile violence. In fact, there has been an increase in the number of violent crimes committed by juveniles during the era of increased transfer.[91] Moreover, as one study recently noted, "juveniles tried in adult courts do not always end up being held more accountable than they would have been in juvenile court, and they often are exposed to physical and sexual assaults that would not have occurred in juvenile institutions."[92]

The increased use of transfer has also produced unintended negative consequences. One such unintended consequence is that transfer has had an overwhelmingly disproportionate impact upon African-Americans and other minorities.[93] [62]

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90 Moseley Braun Bill Would Try Some 13 Year Olds As Adults, Chi. Trib., Oct. 27, 1993, § 1 at 7.

91 A survey conducted by the Office of Juvenile Justice Prevention found that the per capita rate of violent offense cases increased 18% from 1985 to 1989. This finding was based upon a national survey of 10 selected jurisdictions. Despite this overall increase in violent crime, violent crimes comprise only about 8% of all juvenile crime. Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, Juvenile Justice Bulletin (Apr. 1993).

92 National Coalition of State Juvenile Justice Advisory Groups, Myths and Realities: Meeting the Challenge of Serious, Violent, and Chronic Juvenile Offenders: The Eighth Report to the President, the Congress, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention (Fall 1992) [hereinafter Report of Juvenile Justice Advisory Groups].

93 Data gathered by the Cook County Public Defender's Office during 1992-1993 indicate that approximately 95% of juveniles subject to discretionary transfer during that period were African-American. This research was conducted by Kendall Hill, Assistant Public Defender, Cook County Public Defender's Office. See also Report of Juvenile

Before we blindly continue down the path to the increased use of transfer, we should pause and reflect on the successes and failures of the transfer strategy. ***The Illinois Supreme Court, for example, should recommend that the Illinois Generally Assembly study whether the goals of transfer laws have been met and what, if any, unintended consequences of transfer have emerged. Such a study should be informed by the experience of juvenile and criminal court judges, prosecutors, defenders, probation officers, correctional officials, and other court personnel who have acquired special knowledge of the systemic impact of transfer.*** The collective voice of these practitioners has, to date, been largely ignored.

Automatic and Discretionary Transfer

During the last ten years, an increasing number of juveniles have been transferred to adult court.[94] The increase in the number of juveniles tried as adults has been the result of a number of factors. First, as previously discussed, there has been an increase in the number of serious, violent offenses committed by juveniles. Second, the General Assembly has expanded the number of offenses for which transfer is required.[95] Third, prosecutors may be electing to

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Justice Advisory Groups, supra, at 33; America's Children at Risk, supra. Between 1987 and 1991, the proportion of confined juveniles who were children of color rose from 53% to 63%, with the largest increase among African-Americans (37% to 44%) and Latinos (13% to 17%).

94 In Cook County during the last 10 years, a total of 2,555 juveniles were transferred to adult court. Discretionary transfers accounted for 522 of these cases. There were 2,033 automatic transfers. The percentage breakdown by offense was as follows: armed robbery 35%; sex offenses 15%; murders 29%; drug/weapons near school or public housing 20%. This research was conducted by the Children and Family Justice Center of the Northwestern University School of Law in the Spring of 1993.

95 The General Assembly has increased the categories for which transfer is mandated to include non-violent crimes, requiring that juveniles found with guns or drugs in or near public housing or schools must be transferred. See 705 ILCS 405/5-4(6)(a), (7)(a).

try more juveniles as adults both in the discretionary and automatic categories through charging decisions. Thus, the increase in the number of juveniles tried as adults reflects changes in the composition of the population committing serious crimes as well as political and law enforcement strategies for addressing the problem of crime committed by young people. [63]

It appears that the criminal court system has not been a significant player in policy decisions regarding the determination of how many juveniles should be tried as adults. Nevertheless, the impact of this policy — the increasing number of youth under the age of 16 in adult court — is felt directly by criminal courts. It is in the criminal courts that decisions are made resulting in the prolonged incarceration of young people in state penitentiaries. Criminal courts practitioners also have some sense of whether there are adequate sentencing alternatives for young people transferred or initially prosecuted under automatic transfer laws. The observations of judges and criminal courts practitioners concerning the increased use of transfer could be invaluable to legislators.

The increasing use of transfer also has had an impact upon our juvenile courts. On the one hand, the need to make discretionary transfer decisions ties up substantial judicial and detention resources in juvenile court (at least in Cook County).[96] On the other hand, the increased use of transfer to adult court implies that juvenile courts are unable effectively to address the problem of serious juvenile crime.[97] Again, the question of what kinds of cases juvenile courts

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96 The population of the Cook County Juvenile Detention Center on November 5, 1993 was 651, approximately 160 over capacity. Approximately one-third of the population remains in the Detention Center for prolonged periods because of discretionary and automatic transfer policies. This overcrowding means that approximately 200 children are not in school because it cannot enroll all of the juveniles currently housed in the detention center.

97 However, there is considerable evidence that recidivism rates for juveniles released from juvenile institutions are far lower than such rates applicable to those released from adult institutions. See Report of the National Coalition of State Juvenile Justice Advocacy Groups, supra, at 35. See also The testimony of Charles Fasano of the John

should be handling is a legislative decision. However, decision-making regarding the juvenile court's jurisdiction should be informed by the experience of juvenile court judges, prosecutors, defenders, and state correctional officials. The move to increase the number of [64] children tried as adults has been a political response, rather than a well-reasoned campaign to address the limitations of our juvenile courts and correctional institutions.

As discussed earlier, there is considerable evidence that one unintended consequence of the increased use of discretionary and mandatory transfer is that it disproportionately impacts minorities.[98] If it is true that we disproportionately send our minority youth to adult court and to adult correctional facilities, the court should recommend an investigation into the reasons for this and, if necessary, take steps to redress the problem.

To date, there has not been a cost-benefit analysis of the policy which results in the increasing use of adult court and adult correctional facilities to deal with the problem of juvenile crime. ***Because of the impact that the increasing use of transfer has upon courts and corrections, the Illinois Supreme Court should recommend that the Illinois General Assembly study current transfer practices to determine whether we are on the right track in dealing with serious crimes committed by juveniles. Such a study should include an examination of the population affected by discretionary and mandatory transfer, prosecutorial decision-making regarding the use of transfer, the impact of transfer upon the juvenile and adult court systems, the impact of transfer on correctional resources, whether the policy deters or lessens crime, and whether there are other alternatives which would be less costly to the justice and correctional systems and more beneficial to our communities and to our young people.***

The increasing use of discretionary and automatic transfer of juveniles from the juvenile to the adult criminal jurisdiction has consequences that have not been fully explored. These consequences

Howard Association in In re S.M. No. 92 12006 (Juv. Ct. of Cook Cty. Sept. 30, 1993) also discusses this evidence.

98 See supra note 93.

include, among others, increasing the numbers of young offenders utilizing the resources of the criminal system, increasing the number of young people being incarcerated in adult penal institutions, a possible discriminatory effect as far as the racial composition of the [65] transferred population is concerned, and the short and long-term effects of treating juveniles as adults within our court and correctional systems. ***The Illinois Supreme Court should appoint a Committee to study the question of whether the increasing use of transfer is achieving its intended results and what, if any, unintended consequences have been manifested.***

More specifically, the Committee should investigate the following questions:

1. ***Do juveniles transferred to adult court receive harsher penalties than they would receive in juvenile court? Are juveniles being held more accountable for their actions because of the transfer?***

2. ***Are adult probation services geared to providing services to young offenders?***

3. ***Are the resources of the criminal courts sufficient to manage increasing numbers of young offenders?***

In addition, the Illinois Supreme Court should consider recommending legislation that would:

1. ***Permit determinate sentencing to the Juvenile Division of the Department of Corrections for certain serious felonies as an alternative to transfer to adult court. (This would decrease pressure to transfer juveniles to the adult system);***

2. ***Permit "waiver back" to juvenile court in appropriate circumstances of juveniles who are sentenced as adults but who are found to be amenable to treatment;***

3. ***Reduce or eliminate mandatory minimum sentences for juveniles convicted in adult court in order to tailor sentences of young offenders to the needs of youth committed to the Department of Corrections;***

4. ***As an alternative to transfer, permit a juvenile court judge, after a hearing to extend juvenile court jurisdiction beyond the age of twenty-one (but not beyond age [66] twenty-five) for minors charged with violent offenses who are not ready to be released back into the community at age twenty-one.***[99]

5. ***Increase the resources of the Juvenile Division of the Department of Corrections to meet the demands that will be made upon it if proposals 1-4 above are implemented.***

The foregoing recommendations are consistent with the recommendation of the American Bar Association's Presidential Working Group on the Unmet Legal Needs of Children and Their Families. Its report advocates U.S. Department of Justice support for the development of model programs to reduce the number of juveniles transferred to adult courts.[100]

Appealability of Discretionary Transfer Orders

At present, there is an inequity in Illinois law regarding the transfer of minors from the juvenile court to the adult court. The State is permitted to appeal a juvenile court judge's decision not to transfer a juvenile, but a juvenile cannot appeal an adverse transfer decision until after he or she is convicted in adult court. This imbalance has profound consequences for juveniles. It encourages abuses of prosecutorial discretion in the decision to file appeals, results in prolonged periods of pretrial detention of minors, and deprives minors of the rehabilitative services of the Juvenile Court. There is simply no compelling reason why both the State and the

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99 In his article, The Delinquent and the Juvenile Court: Is there Still a Place for Rehabilitation?, 25 Conn. L. Rev. 57 (1992), the Honorable Gordon A. Martin, Associate Justice of the Massachusetts Trial Court and past chair of the Juvenile Law Committee of the National Council of Juvenile and Family Court Judges, advocates forcefully for extended commitment statutes as an alternative to increased reliance on transfer and discusses legislative efforts in this direction in both Massachusetts and California.

100 America's Children at Risk, supra, at 65.

juvenile should not be entitled to an interlocutory appeal. The Supreme Court should use its rulemaking power to remedy this imbalance. [67]

In 1969, the Illinois Supreme Court, in People v. Jiles, 43 Ill. 2d 145, 251 N.E.2d 529, was asked to use its rulemaking power to adopt a rule which would permit interlocutory appeals from transfer orders. The Court declined to adopt such a rule, holding that a juvenile did not have the right to an interlocutory appeal of an adverse transfer decision because:

> to permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized ... To permit interlocutory review would subordinate that primary issue [innocence or guilt] and defer its consideration while the question of punishment appropriate for a suspect whose guilt has not yet been ascertained is being litigated in the reviewing courts.[101]

Eight years later, however, in People v. Martin, 67 Ill. 2d 462, 367 N.E.2d 1329 (1977), the Illinois Supreme Court held that the State has the right to appeal an adverse decision in a transfer case. The Court, noting that the State, unlike a juvenile, could not appeal an order denying transfer at the conclusion of the proceedings, held that the trial court's decision "ought not to be totally immunized from review."[102] This is a good reason to permit the State to have an interlocutory appeal, but it is not a reason why the minor should not be permitted one as well.

This lack of reciprocity has profound consequences. When the State appeals a juvenile court's decision not to transfer, the minor may ultimately spend in excess of two years waiting for the appeal to conclude. Even though defense attorneys routinely request that these cases be placed on the appellate court's accelerated docket,

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101 Jiles, 433 Ill. 2d at 150, 251 N.E.2d at 531.

102 Martin, 67 Ill. 2d at 466, 367 N.E.2d at 1331.

delays in preparing the record on appeal — juvenile court reporters routinely take eight to ten months to prepare transcripts — coupled with extensions in the briefing schedule and delays in the decision-making process generally result in two years passing from the time the State files its notice of appeal. Although [68] minors against whom an interlocutory appeal has been filed are eligible for bail, these minors and their parents often cannot afford to post the bond necessary to secure release. Thus, juveniles may be detained for more than two years before their adjudicatory hearing, after which they may be acquitted. Two years is a long period of time in anyone's life but seems like an eternity to many of the minors in custody whose lives are hanging in the balance.

During this entire time, these minors do not receive the benefit of the full range of the rehabilitative services of the juvenile court. Those in custody receive only the limited services offered by the Juvenile Temporary Detention Center, and those out of custody receive no services at all from the Probation Department. To make matters worse, the time that these minors spend waiting for the decision of the appellate court is not credited as time served toward any sentences they may receive if convicted under the Juvenile Court Act and sentenced to the Juvenile Division of the Department of Corrections.

The standard of review on an appeal of a decision to transfer is the abuse of discretion standard. Judges are given a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the ultimate transfer decision.[103] There is no precise mathematical formula for the weighing of the statutory factors; the court need only consider each of the factors and no one single factor is determinative.[104] This standard of review has made it extremely difficult for the State to win its appeals. During the past ten years, only two opinions — one published and one

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103 People v. Liggett, 90 Ill. App. 3d 663, 413 N.E.2d 534, 537 (4th Dist. 1980).

104 See, e.g., People v. Newell, 135 Ill. App. 3d 417, 481 N.E.2d 1238, 1242 (1st Dist. 1985); People v. Cater, 78 Ill. App. 3d 983, 398 N.E.2d 28 (3d Dist. 1979).

unpublished — have been issued reversing the juvenile court judge's decision not to transfer. Yet, the State has repeatedly used its discretion to appeal adverse transfer decisions. [69]

Affording only the State an interlocutory appeal of transfer decisions creates a situation that is ripe for abuse of prosecutorial discretion. Because many juveniles cannot afford to make bail, there is little downside for the State to appeal adverse transfer decisions. In fact, there is every incentive to appeal because appealing transfer decisions enables the State to keep a juvenile in custody for lengthy periods of time pending resolution of the appeal. In addition, the State can and has used its right of appeal as a bargaining chip in plea negotiations. Faced with the prospect of having to wait years in custody for a decision, even an innocent juvenile may be tempted to take a plea as long as it keeps him or her in juvenile court.

The current lack of reciprocity also allows the State substantial control over how the law regarding transfer in Illinois is developed. The State gets to pick and choose which cases it will appeal and which issues it will raise on appeal. A minor cannot raise any issues regarding the transfer decision until after the minor is tried, convicted and sentenced in adult court. There is no mechanism prior to the minor's conviction in adult court whereby the minor can challenge improper evidentiary rulings by the juvenile court judge, improper interpretations of the transfer statutes, and violations of the minor's constitutional rights.

Although these issues and others can be raised after conviction in the adult court, because of delays in our criminal and appellate courts, many of these juveniles will reach the age of majority by the time they are permitted the right to appeal the juvenile court's decision is redress procedural deficiencies in the transfer decision. Even if an appellate court did reverse a conviction and remand to juvenile court for a new transfer hearing — to date, not a single Illinois court has done so — the information regarding the minor from the original transfer hearing would be outdated. In the few cases in which juveniles were improperly waived, appellate court have responded with one of three remedies: 1) retrial of the juvenile in [70] criminal court; 2) reconstruction of the transfer hearing; or 3)

release of the juvenile.[105] Each of these solutions is problematic. Allowing the State to re-indict the juvenile who is now past the maximum age of juvenile court jurisdiction and to retry him in criminal court is fundamentally unfair to the juvenile and hardly remedies the situation. The simple fact is that the juvenile might never have been required to stand trial on criminal charges if he had been given a defect-free transfer hearing. The juvenile should not be forced to forego the substantial benefits of the juvenile system because of the error of the State or the judge. Outright release of the juvenile, especially in cases where a particularly heinous crime has been committed, may vindicate the juvenile's rights at the expense of protecting the public.

The reconstructed transfer hearing is also of dubious value. The purpose of the reconstructed hearing is to determine if a hearing free from error would have resulted in transfer. The judge in such a hearing must not only attempt to imagine the juvenile as he or she was at the time of the original transfer hearing but must also look forward from the initial proceeding to determine, if at the time of the transfer hearing, the juvenile was amenable to the rehabilitation-oriented treatment offered by the juvenile system. In order to be fair to the juvenile, the judge must put aside his knowledge of the juvenile's subsequent development and present condition and all intervening circumstances concerning the juvenile. This already difficult decision becomes nearly impossible as the reconstructed hearing becomes further removed in time from the original hearing.

An expedited interlocutory review process would assure that, if warranted, reconsideration by the juvenile court would be made while these juveniles were still underage. Such a procedure would also avoid the need for an appellate court, faced with a juvenile convicted in most instances of a violent crime, to have to choose one of the three unappealing [71] and unsatisfactory remedies for the improperly waived juvenile. More importantly, however, juveniles would be spared the burden and public scrutiny associated with a

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105 Note, Review of Improper Juvenile Transfer Hearings, 60 Va. L. Rev. 817, 820 (1974).

criminal trial as well as the stigma associated with being branded a "criminal."

Finally, in declining to exercise its rule-making power in Jiles, the Supreme Court stated that "there is no discernible pattern in the procedures of the various States as to the reviewability of such orders, and because the matter depends so largely upon the varying provisions of the applicable statutes, nothing is to be gained by a detailed analysis of the authorities from other jurisdictions."[106] In the twenty-four years since Jiles, a discernible pattern has emerged in the various states both as to the reviewability of transfer orders and the various transfer statutes. The great majority of states allow a juvenile to seek review of a waiver decision prior to being convicted in criminal court. Most of these states have specifically stated that a juvenile court's waiver of jurisdiction is a "final order" for purposes of appeal. Some states have deemed the orders interlocutory but appealable as of right, and yet other states have deemed the order interlocutory but allow juveniles leave to appeal through permissive or discretionary appeals. Although a sizeable number of states have held that juveniles may not appeal adverse transfer orders until after conviction in criminal court, it appears that only two states, Massachusetts and Illinois, permit the State to appeal waiver decisions but do not allow juveniles to appeal.[107]

Illinois law currently permits the State to file an interlocutory appeal of a juvenile court's decision not to transfer but denies to juveniles the right to interlocutory review of adverse [72] transfer decisions. The consequences of this imbalance of rights are devastating to juveniles. Because of delays in getting transcripts completed coupled with delays in the appellate process, minors often

106 43 Ill. 2d at 148., 251 N.E.2d at 530

107 See Hairfield & Com, 376 S.E.2d 796, 799 n.2 (Va. Ct. App. 1989). It is also no longer true that "because the matter depends so largely upon the varying provisions of the applicable statutes, nothing is to be gained by a detailed analysis of the authorities from other jurisdictions." Jiles, 43 Ill. 2d at 148, 251 N.E.2d at 530. Illinois, like most states, has modeled its transfer on the criteria for transfer decisions outlined in the Supreme Court's decision in Kent v. United States, 366 U.S. 541, 566-567 (1966).

must wait up to two years for the State's interlocutory appeal to be decided. For most minors, this means prolonged periods of pretrial detention, during which time they are deprived of the full range of rehabilitative services offered by the Juvenile Court. The current state of the law also encourages abuses of prosecutorial discretion in the filing of interlocutory appeals, provides the State with leverage in plea bargaining, and allows the State substantial control over the development of the law as it relates to transfer. ***The Illinois Supreme Court should promulgate a rule and procedures for the expedited interlocutory appeals of transfer decisions by both the State and the juvenile.***